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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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GARY ALAN HOLLINGSHEAD,)
Plaintiff,) No. CV-10-0319-CI
v.) ORDER DENYING PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,) AND GRANTING DEFENDANT'S
Defendant.) MOTION FOR SUMMARY JUDGMENT
)

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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 12, 15.) Attorney Lora Lee Stover represents Gary A. Hollingshead (Plaintiff); Special Assistant United States Attorney Nancy A. Mishalanie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

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JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on August 14, 2008. (Tr. 9, 162, 165.) He alleged disability due to frozen shoulder syndrome, diabetes, dizziness, weakness and depression with alleged onset date of November 15, 2002. (Tr. 189, 194.) His claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on November 12, 2009, before ALJ James W. Sherry. (Tr. 31-81.)

1 Plaintiff, who was represented by counsel, and vocational expert
2 Deborah Lapoint (VE) testified. (*Id.*) The ALJ denied benefits on
3 January 11, 2010, and the Appeals Council denied review. (Tr. 9-22,
4 1-5.) The instant matter is before this court pursuant to 42 U.S.C.
5 § 405(g).

6 **STANDARD OF REVIEW**

7 It is the role of the trier of fact, not this court, to resolve
8 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400
9 (1971). If evidence supports more than one rational interpretation,
10 the court may not substitute its judgment for that of the
11 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999);
12 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless,
13 a decision supported by substantial evidence will still be set aside
14 if the proper legal standards were not applied in weighing the
15 evidence and making the decision. *Brawner v. Secretary of Health*
16 and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If there is
17 substantial evidence to support the administrative findings, or if
18 there is conflicting evidence that will support a finding of either
19 disability or non-disability, the finding of the Commissioner is
20 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
21 1987).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled. 20
25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
26 137, 140-42 (1987). In steps one through four, the burden of proof
27 rests upon the claimant to establish a *prima facie* case of
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1 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
2 920, 921 (9th Cir. 1971). This burden is met once a claimant
3 establishes that a physical or mental medically determinable
4 impairment prevents him from engaging in his previous occupation.
5 20 C.F.R. §§ 404.1520(a), 416.920(a). At step five, the burden
6 shifts to the Commissioner to show that (1) the claimant can perform
7 other substantial gainful activity; and (2) a "significant number of
8 jobs exist in the national economy" which claimant can perform. 20
9 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722
10 F.2d 1496, 1498 (9th Cir. 1984).

11 **STATEMENT OF THE CASE**

12 The facts of the case are set forth in detail in the transcript
13 of proceedings and are briefly summarized here. At the time of the
14 hearing, Plaintiff was almost 49 years old. He was a single parent
15 living with his two young sons. (Tr. 39-40.) He testified he
16 completed 11th grade and had a high-school equivalency degree. (Tr.
17 41.) Plaintiff had a long work history as a sheet-metal worker.
18 (Tr. 201.) He testified he could no longer work due to depression,
19 fatigue, chronic dizziness, pain, and problems caused by his
20 shoulders, diabetes, and problems with his pancreas. (Tr. 50-51.)
21 He stated his right shoulder was worse than the left after
22 treatment. (Tr. 51-52.)

23 **ADMINISTRATIVE DECISION**

24 At step one, the ALJ found Plaintiff had not engaged in
25 substantial gainful activity since the alleged onset date. (Tr.
26 11.) At step two, the ALJ summarized the medical evidence and found
27 Plaintiff had the severe impairments of "bilateral frozen
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1 shoulder/adhesive colitis; status post EUA/MUA^[1] right shoulder
 2 posterosuperior labral tear (small); diabetes with diabetic
 3 ketoacidosis; pancreatitis; hypertension; hyperlipidemia;
 4 alcoholism; THC abuse; major depressive disorder, recurrent, mild;
 5 and depression." *Id.*) At step three, he found Plaintiff's
 6 impairments, alone and in combination, did not meet or medically
 7 equal one of the listed impairments in 20 C.F.R., Appendix 1,
 8 Subpart P, Regulations No. 4 (Listings). (Tr. 13.) At step four,
 9 he determined Plaintiff had the residual functional capacity (RFC)
 10 to perform light work with the following restrictions:

11 [H]e is capable of occasional lifting up to 20 pounds at
 12 a time; frequently lifting and carrying 10 pounds;
 13 standing, walking and sitting for 6 hours out of an 8 hour
 14 day; occasional pushing/pulling with the right within
 15 lifting restrictions; never climbing ladders, ropes or
 16 scaffolds; frequent climbing of ramps or stairs,
 17 balancing, stooping, crouching, kneeling and crawling and
 18 occasional right reaching and right reaching overhead. He
 19 should avoid concentrated exposure to extreme cold,
 20 irritants such as fumes, odors, dusts, chemicals and
 21 gases, unprotected heights and use of moving machinery.
 22 He is capable of simple and some complex tasks and
 23 carrying out short and simple instructions but has
 24 episodic lapses in attention and concentration.

25 (Tr. 14-15.) The ALJ found Plaintiff's subjective symptom
 26 complaints that were inconsistent with this RFC were not credible.
 27 (Tr. 16-17.) He determined Plaintiff could no longer perform his
 28 past relevant work and proceeded to step five. (Tr. 20.) At step
 29 five, based in part on the RFC and VE testimony, the ALJ found there
 30 were unskilled light jobs in the national economy that Plaintiff
 31 could perform. (Tr. 20.) He concluded Plaintiff was not disabled,

27 ¹ Examination under anesthesia (EUA) and manipulation under
 28 anesthesia (MUA). (Tr. 12.)

1 as defined by the Social Security Act, from November 15, 2002,
2 through the date of his decision. (Tr. 21.)

3 **ISSUES**

4 The question is whether the ALJ's decision is supported by
5 substantial evidence and free of legal error. Plaintiff asserts the
6 ALJ erred when: (1) he assessed his credibility; (2) he rejected
7 medical provider and consultative examiner opinions in the record;
8 (3) he assessed his RFC; and (4) he posed an incomplete hypothetical
9 to the VE. (ECF No. 13 at 7.) Defendant argues the ALJ's decision
10 is supported by substantial evidence and should be affirmed. (ECF
11 No. 16.)

12 **DISCUSSION**

13 **A. Credibility**

14 Plaintiff appears to argue that because his providers do not
15 report exaggeration of symptoms and there is no affirmative evidence
16 of malingering, the ALJ should have credited his entire testimony.
17 (ECF No. 13 at 11-12.) However, that is not the proper legal
18 standard for rejecting subjective complaints in these proceedings.

19 When the ALJ finds a claimant's symptom allegations are not
20 credible, if there is no affirmative evidence of malingering, the
21 ALJ must provide "clear and convincing" reasons for rejecting the
22 claimant's allegations. *Reddick v. Chater*, 157 F.3d 715, 722 (9th
23 Cir. 1998). If the ALJ's credibility findings are supported by
24 substantial evidence in the record, "the court may not engage in
25 second-guessing." *Thomas V Barnhart*, 278 F.3d 947, 959 (9th Cir.
26 2002); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1999) ("Credibility
27 determinations are the province of the ALJ."). Once the ALJ has
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1 found a claimant's medically determinable impairments could
2 reasonably be expected to produce alleged symptoms, he must consider
3 certain factors in determining credibility. Those factors include
4 reported daily activities inconsistent with alleged complaints;
5 inconsistencies between allegations and conduct; observations of
6 physicians and third parties concerning the nature, severity, and
7 effect of the alleged symptoms; and any unexplained failure to
8 follow treatment recommendations. *Tommasetti v. Astrue*, 533 F.3d
9 1035, 1039 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028,
10 1040 (9th Cir. 2007); *Social Security Ruling (SSR)*² 96-7p.

11 Here, there is no affirmative evidence of malingering. The ALJ
12 properly summarized Plaintiff's written reports and hearing
13 testimony and gave specific reasons for discounting Plaintiff's
14 allegations. For example, he referenced Plaintiff's self-reported
15 daily activities and found they are inconsistent with the degree of
16 disability claimed. (Tr. 15.) He noted Plaintiff's reported care of
17 two minor children and upkeep of their home. The ALJ's reasoning is
18 supported by the record in its entirety, including a 2009 emergency
19 room report that Plaintiff stated he had "been working all day
20 moving things from an apartment on the third floor." (Tr. 566.)

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22 ² Social Security Rulings are issued to clarify the
23 Commissioner's regulations and policy. They are not published in
24 the federal register and do not have the force of law. However,
25 under the case law, deference is given to the Commissioner's
26 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d
27 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3
28 (9th Cir. 1991).

1 These "clear and convincing" examples of inconsistencies in
2 Plaintiff's statements are sufficient to discount allegations of
3 complete disability. *Lingenfelter*, 504 F.3d at 1040.

4 Consistency with medical records is also an appropriate factor
5 to consider, as long as it is not the only factor relied upon. *Id.*
6 Finding Plaintiff's allegations were not supported by medical
7 evidence, the ALJ cited objective evidence from Plaintiff's
8 physicians that contradict allegations of disabling symptoms. (Tr.
9 17.) For example, as found by the ALJ, Plaintiff failed to follow
10 up on treatment recommendations, was non-compliant in his medication
11 regime, and showed poor effort in strength testing. (Tr. 17, 443,
12 512, 734, 758.) He referenced physician reports that Plaintiff's
13 blood pressure and depression are well-controlled with medication;
14 clinic notes of Plaintiff's satisfaction with shoulder surgery
15 results; and evidence of routine and conservative treatment. (Tr.
16 16, 377-83, 566.) As found by the ALJ, contrary to Plaintiff's
17 allegations of unrelenting symptoms, Dr. Emery's clinic notes
18 indicate medication taken as prescribed and abstinence from alcohol
19 substantially resolved diabetes symptoms, dizziness and depression.
20 (Tr. 17, 407, 410, 512, 734.) Clinic notes from orthopedic
21 specialist Eric Bowden, M.D., show Plaintiff reported doing
22 "wonderfully well," in June 2008, after shoulder manipulation. (Tr.
23 17, 309, 318.) Dr. Bowden observed Plaintiff's most important
24 concern was keeping his diabetes under control. Plaintiff's
25 documented non-compliance with treatment requirements supports an
26 adverse credibility finding. *Tommasetti*, 533 F.3d at 1039.

27 In addition, the record shows Plaintiff was not entirely candid
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1 regarding his reported use of drugs and alcohol, in spite of
2 repeated warnings of the negative impact alcohol abuse has on his
3 diabetes, blood pressure, and pancreatitis. (See, e.g., Tr. 403-
4 404, 501, 550, 715.) This evidence supports an adverse credibility
5 finding. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999); see
6 *Warre v. Commissioner of Social Sec.*, 439 F.3d 1001, 1005 n.3 (9th
7 Cir. 2006) (where ALJ makes legally sufficient findings, the court
8 may reference additional support in the record). The ALJ's reasons
9 for discounting Plaintiff's complaints are legally sufficient and
10 supported by substantial evidence in the entire record.

11 **B. Residual Functional Capacity/ Hypothetical Question**

12 Plaintiff contends the limitations assessed by the ALJ in his
13 hypothetical question to the VE and in the final RFC do not include
14 all limitations supported by the record. He specifically argues the
15 ALJ did not include all physical limitations assessed by Dr. Emery
16 and the moderate mental limitation assessed by Dr. Gentile, an error
17 that rendered VE testimony unsupported by substantial evidence.
18 (ECF No. 13 at 9-13.)

19 Plaintiff first claims limitations caused by his upper
20 extremity impairments and diabetes were ignored by the ALJ, who
21 assessed Plaintiff capable of performing light exertional level work³
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23 ³ "Light work" involves lifting no more than 20 pounds at a
24 time with frequent lifting or carrying objects weighing up to 10
25 pounds, and a good deal of walking or standing. Light work may also
26 involve sitting most of the time, but with "some pushing and pulling
27 of arm-hand or leg-foot controls, which require greater exertion
28 than in sedentary work." SSR 83-10. However, relatively few

1 with multiple non-exertional limitations. (*Id.*; Tr. 14-15.)
 2 Plaintiff's argument is not persuasive.

3 The record shows Plaintiff's past work as a sheet metal worker
 4 is classified as medium work (i.e., lifting up to fifty pounds, with
 5 frequent lifting or carrying twenty-five pounds), and Plaintiff
 6 reported lifting and carrying up to 100 pounds, 50 pounds
 7 frequently. (Tr. 75.) Considering Dr. Emery's medical opinions and
 8 objective imaging reports, the ALJ found Plaintiff no longer capable
 9 of medium work. (Tr. 14.) He reasonably limited Plaintiff's light
 10 work capacity by including specific restrictions on lifting and
 11 carrying no more than twenty pounds, and ten pounds frequently. He
 12 limited pushing and pulling to occasionally at ten to twenty pounds
 13 with the right arm. (Tr. 14.) In addition, he restricted Plaintiff
 14 to occasional reaching and right reaching overhead.⁴ Plaintiff's
 15 argument that the ALJ ignored limitations caused by his upper
 16 extremities fails.

17 Review of the entire record shows the ALJ included functional
 18 limitations (exertional and non-exertional) supported by the record
 19 and found credible by the ALJ in his hypothetical question to the
 20 VE. The VE's opinion that there is work Plaintiff can perform is
 21 thus supported by substantial evidence. *Bayliss v. Barnhart*, 427
 22 F.3d 1211, 1217 (9th Cir. 2005). The ALJ's summary of the medical
 23 evidence includes a discussion of findings and limitations assessed

24
 25 unskilled light jobs entail working in a seated position. *Id.*

26 ⁴ The Commissioner defines "frequently" as one-third to two-
 27 thirds of the time and "occasionally" as very little, up to one-
 28 third of the time. *SSR* 83-10

1 by treating physicians, Drs. Emery and Bowen. (Tr. 12-13.) The ALJ
2 noted specific limitations caused by Plaintiff's shoulder surgery
3 and diabetes, but gave little weight to Dr. Emery's opinion that
4 Plaintiff's physical impairments "markedly affect his employability
5 status." (Tr. 19.) He reasoned Dr. Emery relied "heavily" on
6 Plaintiff's subjective statements, which as discussed above, the ALJ
7 properly found not entirely credible. (Tr. 16-18.) This is a
8 specific and legitimate reason to reject a treating physician
9 opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
10 2001)(medical opinions based on subjective complaints can be
11 rejected where credibility has been properly discounted). In
12 addition, the ALJ found Dr. Emery's assessment of marked limitations
13 was inconsistent with his own treatment notes and other evidence in
14 the record. (Tr. 19.) This is also a legally sufficient reason to
15 discount a treating opinion.⁵ *Tommasetti v. Astrue*, 533 F.3d 1035,
16 (9th Cir. 2008); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
17 2005); *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996). While
18 Dr. Emery's treating opinions warrant deference, they are not
19 controlling in the final RFC determination. SSR 96-5p.

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21 ⁵ Where, as here, the ALJ articulates legally sufficient
22 reasons for discounting a medical opinion, the inclusion of
23 impermissible reasons does not necessarily mean the entire
24 assessment was improper. See *Carmickle v. Astrue*, 533 F.3d 1155,
25 1162 (9th Cir. 2008). The ALJ's speculation regarding Dr. Emery's
26 desire to assist Plaintiff as a motive for his medical opinions is
27 inapposite in these proceedings.

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1 As noted in the ALJ's summary of the entire medical record,
2 substantial evidence (including imaging reports and Dr. Emery's own
3 clinic notes) indicates Plaintiff's condition improved when he
4 complied with treatment recommendation and his prescribed medication
5 regime. The court reasonably can infer from these specific findings
6 that the ALJ's reasoning is supported by substantial evidence.
7 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). The ALJ did
8 not err in rejecting conclusions regarding Plaintiff's employability
9 included in Dr. Emery's opinion letter. *SSR 96-5p* (RFC assessment
10 is an administrative finding of fact reserved to the Commissioner).

11 Regarding alleged problems with concentration, the ALJ
12 appropriately limited Plaintiff to simple work, with some complex
13 tasks. He noted claimant had "episodic lapses in attention and
14 concentration." (Tr. 15.) This mental functional capacity
15 contrasts significantly to past work Plaintiff performed as a
16 supervisor in metal fabrication, which is classified as skilled,
17 with a Specific Vocational Preparation of over 4 years, up to 10
18 years. (Tr. 75.) The ALJ's determination that Plaintiff had
19 adequate concentration to perform simple work with episodic lapses
20 in concentration is supported by substantial evidence from reviewing
21 psychologist Mary Gentile, Ph.D., examining psychologists James
22 Bailey, Ph.D., and Robert Capes, Psy.D., all of whom concluded
23 Plaintiff was not disabled due to mental impairments. (Tr. 19-20,
24 350, 342-47, 534-37.)⁶

25 _____
26 ⁶ Plaintiff appears to argue the ALJ did not properly consider
27 the moderate limitation in the ability to maintain attention and
28 concentration assessed by Dr. Gentile. (Tr. 348.) However, review

1 The final determination regarding Plaintiff's ability to
2 perform basic work is the sole responsibility of the Commissioner.
3 20 C.F.R. §§ 404.1527(e), 404.1546, 416.927(e), 416.946; SSR 96-5p.
4 Although no special significance is to be given to a medical source
5 opinion, the ALJ reasonably included restrictions consistent with
6 unrejected medical evidence and Plaintiff's credible testimony. The
7 hypothetical relied upon by the VE reflects limitations supported by
8 the record and credible testimony. (Tr. 75-76.) Limitations due to
9 pain were addressed reasonably by the exertional and non-exertional
10 restrictions propounded to the VE and included in the ALJ's final
11 RFC determination. (Tr. 14-15.) Because the hypothetical presented
12 at step five is a rational interpretation of the entire record and
13 reflects the final RFC determination, the ALJ did not err in relying
14 on VE testimony that there were jobs in significant numbers that
15 Plaintiff could perform. Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (**ECF No. 12**) is
18 **DENIED.**

19 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is
20 **GRANTED.**

21 The District Court Executive is directed to file this Order and
22 provide a copy to counsel for Plaintiff and Defendant. Judgment

23 _____
24 of the relevant record confirms that Dr. Gentile's summary
25 conclusions and narrative RFC assessment are consistent with the
26 ALJ's finding that Plaintiff is cognitively intact and capable of
27 simple work and some complex tasks with "episodic lapses in
28 attention and concentration." (Tr. 15, 348, 350.)

1 shall be entered for Defendant, and the file shall be **CLOSED**.

2 DATED April 25, 2012.

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4 S/ CYNTHIA IMBROGNO
5 UNITED STATES MAGISTRATE JUDGE
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